

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL

75-7046

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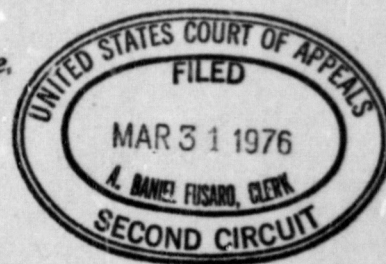
**United States Court of Appeals
For the Second Circuit**

SECURITIES & EXCHANGE COMMISSION,
Plaintiff-Appellee.

-against-

CANADIAN JAVELIN LTD.
JOHN C. DOYLE
WILLIAM M. WISMER
Defendants-Appellees.

SAMUEL H. SLOAN,
Applicant for Intervention-Appellant.



**PETITION FOR REHEARING AND
SUGGESTION THAT THE REHEARING BE IN BANC**

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PETITION FOR REHEARING AND SUGGESTION
THAT THE REHEARING BE IN BANC

QUESTIONS PRESENTED

1. Did the United States Court of Appeals have jurisdiction to dismiss this appeal sua sponte?
2. Does the dismissal of this appeal deprive the applicant for intervention-appellant of due process of law?

STATEMENT OF THE CASE

This is a civil injunction action which was instituted by the Securities and Exchange Commission ("SEC") on November 29, 1973. The complaint alleged violations on the part of the named defendants of SEC Rule 10b-5, 17 CFR 240.10b-5 and other SEC rules. On July 17, 1974 the

Hon. Lloyd F. Mac Mahon entered orders which enjoined defendants Canadian Javelin Ltd. and John C. Doyle "by consent." Five days later Samuel H. Sloan ("Sloan") moved to intervene, to vacate the consent injunction and for other relief. This motion was denied in a decision reported as SEC v. Canadian Javelin Ltd. 64 F.R.D. 648 (1974). The instant appeal was taken from that decision.

Briefs were filed by Sloan and by the SEC. None of the named defendants filed briefs. Oral argument was scheduled for January 7, 1976. Meanwhile, the present president of Canadian Javelin Ltd., Smith, instituted an action in the Quebec courts against Canadian Javelin Ltd. and the SEC which seeks to disclose the injunctions entered by Judge Mac Mahon "null and void." This led the SEC to request and obtain an order from Judge Mac Mahon directing Canadian Javelin Ltd. to retain a certain former SEC employee as counsel for Canadian Javelin Ltd. in the Quebec case. That order was appealed and the appeal is presently pending under Docket No. 75-6130. Oral argument of that appeal has been scheduled for April 2, 1976.*

On January 7, 1976, the instant appeal was dismissed. The summary order stated, in part:

* Since Judge Mac Mahon denied Sloan's motion to intervene, Sloan cannot file a brief in that appeal. However, Sloan concurs but not fully with the arguments presented by appellant Canadian Javelin Ltd. there.

" . . . the appeal . . . is dismissed.
See United States v. Sperling 506 F.2d, 1323,
1345 n. 33 (2d Cir. 1974) and authorities
there cited."

On February 6, 1976 Sloan moved to reinstate this appeal. No opposition was filed by the SEC to this motion. Nevertheless, this motion was summarily denied in all respects on March 14, 1976. Sloan now petitions for a rehearing and further suggests that the rehearing be in banc.

ARGUMENT

Sloan here has an appeal as a matter of right. Ionian Shipping Co. v. British Laws Insurance Co. 426 F.2d 186 (2d Cir. 1970). This point was not disputed by the SEC. In fact, the SEC has never suggested that this appeal be dismissed. Under these circumstances, the question at the outset is whether this court had jurisdiction to dismiss this appeal.

Since this appeal can be had as a matter of right, there is no question that this court had jurisdiction to decide this case. This leads one to examine United States v. Sperling 506 F.2d 1323, 1345 n. 33 (2d Cir. 1974) and the authorities there cited to see if that case provides guidance to an understanding of why this court dismissed this appeal. However, United States v. Sperling was a criminal narcotics case quite unlike the civil securities litigation here. Consequently, the explanation for this court's decision remains a mystery.

A person with some imagination might conclude that the decision to dismiss these appeals had something to do with an order of civil contempt entered in an unrelated case which is the subject of an as yet undecided appeal presently pending before this court under docket No. 75-6106. One wonders whether this court believes that since Sloan was adjudged to be in civil contempt of court in that wholly unrelated case, Sloan should not be permitted to appeal here. If that is the case, then it appears that at least one member of the panel of judges which dismissed this appeal is adopting a "holier than thou" attitude which is inappropriate.

In 1955, William H. Timbers, who is now a judge of the United States Court of Appeals for the Second Circuit, was General Counsel for the SEC and, while acting in this capacity, was adjudged to be in civil contempt of court and was remanded to the custody of the U.S. Marshal. The charge against Judge Timbers was that he had contumaceously refused to obey the order of a federal judge by refusing to produce certain records of the SEC. Subsequently, however, Judge Timbers was released by the Court of Appeals and the district court order was reversed. Appeal of the United States Securities and Exchange Commission 226 F. 2d 501 (6th Cir. 1955). This decision, incidently, was cited in the appellant's main brief.

On January 7, 1976 the same William H. Timbers, who is no longer employed by the SEC and is now a federal judge, had the gall to sit on this case and to dismiss three Sloan appeals including this one. Had the Sixth Circuit done in 1955 what the Second Circuit has done here, Judge Timbers would presumably still be in jail, unless by this time he had decided to turn over the records of the SEC as ordered, and therefore would not be a federal judge.

Interestingly, the analogy between the two cases is clear although the shoe is on the other foot. Both cases involve the production of records although Sloan would seem to have a better case since he claims that the production of these records would violate his Fourth and Fifth Amendment rights whereas no such claim was or could have been made by Judge Timbers or the SEC. Nevertheless, from comparing these decisions, the Government appears to have more rights and privileges than does the individual, although this result was clearly not contemplated by the constitution.

The SEC, it should be noted, has expressed no objection to having this appeal decided on the merits, and quite understandably. If the SEC loses this appeal it will lose little if anything and if it wins the power of the SEC will be substantially increased. The SEC was clearly happy with Judge Mac Mahon's opinion and at one point an SEC attorney expressed hope that it would be published in the Federal Supplement. (See appendix in Docket No. 75-7056 p. 57).

It can be observed that while the dismissal of this appeal injures Sloan, it does not benefit the SEC, the defendants or the court. Injunctions of the sort obtained by the SEC are subject to various kinds of collateral attacks. For example, a "consent decree" obtained by the Government in 1920 has been attacked numerous times in the federal courts and has been challenged in the Supreme Court on five separate occasions which are described in United States v. Armour & Co. 402 U.S. 673 (1971). By throwing Sloan out of court arbitrarily, this court leaves unresolved the issues raised by Sloan which are much the same as those raised by Smith in his suit against the SEC and Canadian Javelin Ltd. in the Quebec courts.

It should be obvious that this court had no jurisdiction to dismiss this appeal and that the dismissal of this appeal deprives Sloan of his constitutional rights. If this point is not obvious, then at least this court should write an opinion and explain the rationale for what it did. In either case, this petition for a rehearing should be granted.

It is suggested that the rehearing of this appeal be in banc. In effect, this court has been deciding the issues involved here in banc already so a rehearing in banc would be warranted. The decision to dismiss this appeal was made by a panel consisting of judges Timbers, Van Graafeiland and Meskill. In an order of the Hon. William H. Mulligan,

entered on January 28, 1976 in Sloan v. Canadian Javelin Ltd. No. 75-7096, it was implied that unless Sloan appeared in court on February 2, 1976, that appeal would be dismissed also. Judges Hayes and Gurfein were also on the panel in that appeal. In yet another appeal, Sloan v. SEC, slip op. 2377 Judge Feinberg wrote a per curiam opinion which stated that the instant appeal was dismissed because Sloan was "a fugitive from justice when the case came on to be heard," something which the panel in the instant appeal did not say. Judges Oakes and Van Graafeiland concurred in that opinion. It should be pointed out that in writing his opinion, Judge Feinberg violated Rule 0.23 of the Second Circuit. That rule states:

"Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court." (emphasis supplied)

In any event, since it appears that judges Timbers, Van Graafeiland, Meskill, Mulligan, Hayes, Gurfein, Feinberg and Oakes are in at least informal concurrence with the decision to dismiss these appeals, and since this decision is likely to affect the outcome of two Sloan appeals still pending before this court under docket numbers 75-6106 and 75-4087, it is most appropriate that the rehearing of this appeal be in banc.

Respectfully submitted,

Samuel H. Sloan

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Dated: March 29, 1976

75-7046

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 296 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29 day of March 1976 deponent served the within Petition upon:

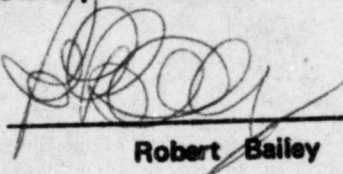
Michael J. Steward, Esq.
Securities & Exchange Commission
and
Diamond & Golomb, Esqs.
and
Moses, Krislow, Esq.

attorney(s) for
Appellee

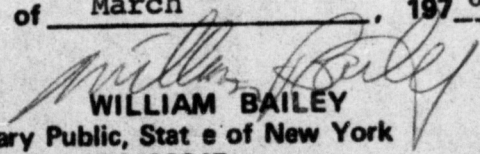
in this action, at

500 N. Capitol St.
Washington, D.C. 20549
and
99 Park Ave., NYC
and
Engineers Building, Cleveland, Ohio

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


Robert Bailey

Sworn to before me, this 29
day of March, 1976.


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977